IN THE HIGH COURT OF BOMBAY AT GOA, PANAJI-GOA

Criminal Miscellaneous Application No.188/2005

Mr. Ferdinand H. Araujo,
Proprietor of Diania's Shop, 30,
Kamat, Arcade, Opp.
Hindu Crematorium,
St, /indez, Panaji-Goa. ..... Applicant

VERUS

1. Mr. Sudhakar Desai,
   Amar Bakery, H.No. 523/B,
   Vadlem Bhat, Taleigao, Goa.
2. State of Goa,
   through Public Prosecutor,
   Panaji-Goa. ..... Respondents

Shri P.A. Kamat, Advocate for the Applicant.
Shri Umesh Rao, Advocate for Respondent No.1.
Shri S.N. Sardessai, Advocate for Respondent No.2.

CORAM **: N. A. BRITTO, J.**

DATE : **14/12/2005**

ORAL ORDER

Heard Shri Kamat, the learned Counsel on behalf of the Applicant who is the Complainant in Criminal Case No. 334/0A/03/C and Shri Umesh Rao, the learned Counsel on behalf of Respondent No.1/Accused.

2. The Complainant's application dated 3/08/05 for recalling of PW 2, filed under Section 311 of Criminal Procedure Code, 1973, has been

rejected by the learned JMFC, Panaji by order dated 16/08/05 and the Complainant has now invoked the jurisdiction of this Court under Section 482 of the Code to set aside the said order. The Complainant has prosecuted the said accused for dishonour of cheque bearing No.320282 dated 22/3/03 for a sum of Rs. 41,976.40. It appears that the said cheque was returned, when presented for payment, with endorsement that the funds were insufficient. After examining the Complainant, the Complainant examined PW 2, Bank Manager who identified the signature of another Bank Manager on the said cheque return memo. The said cheque return memo mentions the number of the cheque as 320382. In other words the fourth digit has been mentioned as 3 instead of 2. This error apparently was noticed at the time of hearing of arguments and as a result of which the Complainant wrote a letter to the Bank dated 25/07/05 and the said bank namely Canara Bank, Panaji, replied to the said letter stating that the cheque number on the said memo be read as 320282 instead of 320382 and that the same letter may also be produced before the Court, if necessary. After the said letter was received the Complainant filed the said application dated 3/08/05 for recalling the said PW 2 with a view to explain the said error in mentioning the number of the cheque which came to be rejected by the impugned order dated 16/08/05.

3. Shri Kamat, the learned Advocate on behalf of the Complainant submits that the Complainant only wanted to correct the said number of the

cheque as mentioned on the said cheque return memo. He further submits that the correct number of the cheque was otherwise mentioned in the notice served upon the accused demanding the payment as well as in the complaint and being a mere error in mentioning the number, and the application being only for correction of a mere error, the same ought to have been allowed by the learned JMFC. Shri Kamat submits that there was no question of any lacuna being filed in by the complainant as held by the learned JMFC. On the other hand Shri Rao submits that recalling the said PW 2 and correcting the said number of the cheque will amount to introducing entirely a new document.

4. What is meant by filing up lacuna in the case of prosecution has been explained by the Supreme Court in the case of ***Rajendra Prasad Versus Narcotic Cell*** (AIR 1999 SC 2292). The Supreme Court has stated that a lacuna in the case of the prosecution is not to be equated with fall out of an oversight committed by a public prosecutor during trial, either in producing relevant materials or in eliciting relevant answers from witnesses. The supreme Court further stated that the the power under Section 311 of the Court is plenary to summon or even recall any witness at any stage of the case if the Court considers it necessary for a just decision. Here was a case where the complainant wanted to re-examine PW 2, because there was a mistake in writing the number of the cheque on the cheque return memo issued by the Canara Bank and which mistake was infact subsequently

admitted on behalf of the Bank in the letter sent by the Bank to the complainant, dated 29/7/05. As per the said letter written by the Senior Manager of Canara Bank, the error was accidental. Indeed it was typographical mistake in writing the number of the cheque as 320382 instead of 320282. By no stretch of imagination an attempt to correct such typographical mistake could be considered to be filing in a lacuna in the case of the prosecution and that being so the learned JMFC ought to have allowed the complainant's application dated 3/08/05.

5. As a result the application filed by the complainant under Section 482 of the Code is hereby allowed. The order dated 16/8/2005 is hereby set aside. Consequently the application filed by the complainant dated 3/08/05 shall stand allowed.

N. A. BRITTO, J.

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